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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Abbyy USA Software House, Inc., Plaintiff, v. Nuance Communications Inc. Defendant.	Case No.: CV-08-1035-JSW **DEFENDANT NUANCE COMMUNICATIONS, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS CLAIMS SIX THROUGH NINE OF ABBYY USA's AMENDED COMPLAINT** Date: October 3, 2008 Time: 9:00 am. Judge: Hon. Jeffrey S. White Courtroom 2

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

MISCELLANEOUS

Summary of Argument Pursuant to Civil Standing Order Rule 6

Abbyy USA's antitrust claims consist of a hodgepodge of vague, confusing, and cursory allegations regarding purportedly illegal activity. Because of the lack of specificity of the claims raised against Nuance, it is difficult to ascertain exactly what conduct by Nuance Abbyy USA has alleged is illegal under the Sherman Act. Indeed, Abbyy USA's antitrust claims are so vague that they fail the most basic pleading standards for an antitrust complaint.

First, the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), makes it clear that the type of conclusory allegations of exclusive dealing, agreements on prices, unnamed acquisitions and litigation threats raised here should not survive a motion to dismiss. In the absence facts that plausibly suggest an antitrust violation, a company subject to such claims cannot determine what the conduct was that allegedly violated the antitrust laws. *Id.* at 1974. As such, Abbyy USA's antitrust claims should be dismissed.

Second, many of Abbyy USA's claims should be dismissed because they do not allege "antitrust injury." Several of the allegations raised in claim six, as well as claims seven, eight and nine, allege that Nuance's actions resulted in "stabilized prices," or "higher prices" "to the detriment of the consuming public." *See* Compl. ¶ 39 (Claim Six); Compl. ¶ 48 (Claim Seven); Compl. ¶ 52 (Claim Eight); Compl. ¶ 56 (Claim Nine). As the Supreme Court has made clear, competitors cannot "recover damages for any conspiracy by petitioners to charge higher than competitive prices, . . . [because] it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price[.]" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83 (1986).

Third, Abbyy USA's only specific allegation of an anticompetitive acquisition is the 2000 acquisition of Caere by Nuance. Compl. ¶¶ 54-57 (Claim 9). The statute of limitations for such claims is four years. *See Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 858 F.2d 499, 501 (9th Cir. 1988) ("Antitrust actions under the Clayton Act are subject to a four-year statute of limitations. 15 U.S.C. § 15b (1982)."). The Caere acquisition in 2000, is well-beyond the four-year statute of limitations.

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on October 3, 2008 at 9:00 a.m. or as soon thereafter as may be heard, in the courtroom of the Honorable Jeffrey S. White, located at 450 Golden Gate Avenue, Courtroom 2, 17th Floor, San Francisco, California 94102, Defendant Nuance Communications, Inc. ("Nuance") will and hereby does move for an order granting Nuance's Motion to Dismiss Plaintiff Abbyy USA Software House's ("Abbyy USA") Sixth, Seventh, Eighth, and Ninth Causes of Action pursuant to Federal Rule of Civil Procedure 12(b)(6) and the Rules of this Court. Nuance submits this memorandum in support of its motion.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On June 4, 2008, Abbyy USA amended its complaint for declaratory judgment for noninfringement and invalidity of certain Nuance patents and added antitrust claims alleging that Nuance engaged in a series of actions that constitute monopolization in violation of Section 2 of the Sherman Act (Compl. ¶¶ 31-43), attempted monopolization in violation of Section 2 of the Sherman Act (Compl. ¶¶ 44-49), exclusive dealing in violation of Section 1 of the Sherman Act (Compl. ¶¶ 50-53), and a substantial lessening of competition in violation of Section 7 of the Clayton Act (Compl. ¶¶ 54-57). Nuance moves to dismiss these antitrust claims.

ARGUMENT

I. THE STANDARD FOR DISMISSAL UNDER FED. R. CIV. P. 12(B)(6)

A complaint must be dismissed if it fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6); *see also Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994). A plaintiff has an obligation to "provide the 'grounds' of [its] 'entitle[ment] to relief,'" which "requires more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. at 1959 (citations omitted). *Twombly* "retired" the former dismissal standard established in *Conley v. Gibson*, 355 U.S. 41 (1957). In rejecting *Conley's* pleading standard, *Twombly* held that a complaint cannot survive dismissal if it fails to plead facts that ***plausibly*** suggest antitrust conspiracy. *Twombly*, 127 S. Ct. at 1974.

Specifically for claims brought under Section 1 of the Sherman Act, *Twombly* requires that a court examine whether the complaint alleges "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 1965. If allegations in a complaint, taken as true, cannot raise a claim of entitlement to relief, that "'basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Id.* at 1966 (citations omitted) (alteration in original). Likewise, a complaint alleging violations of Section 2 of the Sherman Act must allege sufficient facts to explain the nature of the conduct that violates the antitrust laws. *See SmileCare Dental Group v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996) (dismissal of Section 2 claim appropriate "'notwithstanding its conclusory language regarding the elimination of competition'") (*quoting Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735 (9th Cir. 1987)).

This pleading requirement is an essential tool. It ensures that meritless antitrust claims—particularly those based on a flawed legal theory—will be dismissed. *See Twombly*, 127 S. Ct. at 1966-67; *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) (emphasizing that courts need to "exercise sound discretion and use the tools available" to dismiss baseless antitrust claims).

II. THE ANTITRUST CLAIMS FAIL TO ALLEGE CONDUCT THAT VIOLATES THE ANTITRUST LAWS

A. Sixth Claim

Abbyy USA's Sixth Claim is for monopolization under Section 2 of the Sherman Act. *See* 15 U.S.C. § 2.[1] Paragraph 38 of the Sixth Claim identifies five separate "predatory acts" as the basis for its claim under Section 2 of the Sherman Act. None of these alleged predatory acts,

[1] "'In order to state a claim for monopolization under Section 2 of the Sherman Act, a plaintiff must prove: (1) Possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury.'" *SmileCare Dental*, 88 F.3d at 783 (*quoting Pacific Express, Inc. v. United Airlines, Inc.*, 959 F.2d 814, 817 (9th Cir. 1992)).

considered separately below, are pleaded with anywhere near the level of specificity required under the Federal Rules to survive a motion to dismiss.

1. Exclusive Dealing

The first "predatory act" alleged in Abbyy USA's Sixth Claim is that Nuance "entered into exclusive contracts with retail outlets in an attempt to foreclose the number of outlets available to competitors' products." Compl. ¶ 38(a). The claim does not provide any additional facts regarding these so-called exclusive dealing contracts, but instead relies entirely on unsupported legal conclusions. It is clear that exclusive dealing allegations—such as those made by Abbyy USA—supported only by "bare legal conclusions," should not survive a motion to dismiss. *See Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177, 1196-97 (S.D. Cal. 2002).

Specifically, the claim does not provide any facts pertaining to the exclusive dealing contracts—namely, **what** types of contracts; with **whom** Nuance contracted; **how much** of market the agreements foreclosed; the **length** of the agreements; or whether there were **alternative channels** available to Abbyy USA or its competitors. Indeed, Abbyy USA has failed to allege any facts which, even if assumed to be true, would establish that the alleged exclusive dealing contracts have foreclosed Abbyy USA or other competitors from selling in the Full Text OCR software market.

Abbyy USA's only allegation with regard to foreclosure is that Nuance's conduct has had the effect of "eliminating Abbyy USA as a potential and actual competitor in *certain retail outlets.*" Compl. ¶ 43 (emphasis added). However, this allegation is precisely the type of "bare legal conclusion" that courts in this Circuit have concluded should not survive a motion to dismiss. *See Kingray*, 188 F. Supp. 2d at 1197. Abbyy USA has not alleged that the alleged exclusive contracts with "certain retail outlets" prevent Nuance's competitors from competing in the market or that the sales through those retail outlets "constitute a substantial share of the relevant market." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961); *see also Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) ("'Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal.'") (citation omitted). As the Supreme Court has often

declared, "[t]he antitrust laws were enacted for 'the protection of *competition*, not *competitors*.'" *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990). Even accepting as true that Abbyy USA has been eliminated from "certain retail outlets," this fact does not show harm to competition in the market generally as the antitrust laws require, as opposed to specific harm to Abbyy USA.

Additionally, Abbyy USA has not alleged that the exclusive contracts with "certain retail outlets" have prevented it from selling Full Text OCR software to end users. Instead, Abbyy USA has alleged that it is prevented from selling through one means of distribution: "certain retail outlets." Compl. ¶ 43. In *Omega Environmental*, the Ninth Circuit explained that courts should be skeptical of claims of exclusive dealing that restrict only one means of distribution: "If competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether such restrictions foreclose from competition *any* part of the relevant market." 127 F.3d at 1162-63. Abbyy USA has made no allegations that state or even imply that "certain retail outlets" are the only way to sell Full Text OCR software to end users. In fact, Abbyy USA alleges that Nuance's Full Text OCR software is "sold directly to consumers, home offices, small businesses and Original Equipment Manufacturers (OEMs)," and is also licensed and sold to OEMs and "other software companies." Compl. ¶¶ 33-35. By Abbyy USA's own admission, direct sales and licensing agreements are alternative methods for distributing Full Text OCR software.

Abbyy USA also does not allege that the exclusive agreements at issue are with such a large number of retail outlets that Abbyy USA cannot reach end users by selling its products through the remaining retailers. At the same time, in its Answer to Nuance's Complaint transferred to this Court, Abbyy USA admits that it sells through online retailers and alleges that Nuance also sells directly to end users as well as through licensing agreements. *See* Answer and Counterclaim of Abbyy USA Software House, Inc.; Demand for Jury Trial ¶ 20. The contradiction dooms Abbyy USA's exclusive dealing claim, as it demonstrates that Abbyy USA has not been foreclosed from selling its products, and admits that its products can be, and indeed are, sold through other channels of distribution.

Courts in this Circuit have dismissed for lack of specificity far more detailed claims of illegal exclusive dealing. For example, in *Kingray*, the Court dismissed a claim that alleged that the defendants "'[a]greed, conspired, and/or contracted to distribute [the NBA League Pass] to satellite dish owners/users on an exclusive basis through DirecTV, thereby limiting and restricting competition at the consumer level,' as consumers have been deprived of the benefit of free and open competition among satellite television providers." 188 F. Supp. 2d at 1197 (citation omitted). The complaint "further allege[d] that no other satellite provider, such as Echostar, is authorized to provide NBA League Pass games." *Id.* Finding that "[t]hese allegations are bare legal conclusions," the Court dismissed the complaint for failing to allege sufficient facts regarding the nature of the exclusive dealing arrangements, the effect of the exclusive dealing arrangements, or whether alternative avenues of distribution existed. *Id*. at 1197-98. The Sixth Claim fares no better and should be dismissed for the same reasons.

2. Agreements with Competitors

The second "predatory act" alleged in Abbyy USA's Sixth Claim is that Nuance "sought to reach agreement with competitors on pricing so that Nuance could raise prices without regard to market pressure." Compl. ¶ 38(b). The Court should dismiss this claim for three reasons. First, under well-established Supreme Court precedents, cannot challenge conduct that has the effect of raising prices because they do not suffer antitrust injury as a result of such an alleged conspiracy. Second, Abbyy USA lacks antitrust standing to bring such claims: direct purchasers of Full Text OCR software, not a competitor like Abbyy USA, are the proper plaintiffs to bring claims for price fixing. Third, Abbyy USA's bare allegation that Nuance "sought to reach agreement with competitors on pricing" is insufficiently pleaded to survive a motion to dismiss under the Supreme Court's recent *Twombly* decision.

First, Abbyy USA's claim does not allege cognizable "antitrust injury." In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, the Supreme Court explained that in order to recover under the antitrust laws, "[p]laintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." 429 U.S. 477, 489 (1977); *see also Atl. Richfield*, 495 U.S. at 339 n.8 ("Respondent's

theory would equate injury in fact with antitrust injury. We declined to adopt such an approach in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), and we reject it again today.") (Internal parallel citations omitted). The "antitrust injury" requirement deliberately restricts who can sue and on what types of claims because "'Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.'" *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534-35 (1983) (citation omitted); *see also Matsushita*, 475 U.S. at 582-83 ("[R]espondents [cannot] recover damages for any conspiracy by petitioners to charge higher than competitive prices in the American market, . . . [because] it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price[.]").

Even if the Court presumes for purposes of this motion to dismiss that Nuance not only "sought to reach agreement with competitors on pricing," but actually did reach such an agreement, it is clear that Abbyy USA did not suffer antitrust injury. As a competitor, higher prices for Full Text OCR "would have worked to [Abbyy's] advantage" by allowing Abbyy USA to charge higher prices as well or charge lower prices and make more sales. *See Atl. Richfield*, 495 U.S. at 337. Therefore, Abbyy USA's claim that Nuance sought to set prices with competitors should be dismissed because Abbyy USA suffered no antitrust injury.

Second, Abbyy USA does not have antitrust standing. In order to bring an antitrust claim for damages, a plaintiff not only must allege antitrust injury, as explained above, but also must have antitrust standing. As explained in *Cargill*, "[a] showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons." 479 U.S. at 110 n.5.[2]

The Supreme Court's decision in *Associated General Contractors* ("*AGC*") outlines a five-factor test for determining whether a plaintiff has antitrust standing: (1) the causal connection

[2] Although not identified in Abbyy USA's pleadings, Clayton Act Section 4 authorizes private suits for damages. 15 U.S.C. § 15.

between the alleged antitrust violations and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiff's alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness with which the alleged market restraint caused the asserted injury; (5) the speculative nature of the damages; and (6) the risk of duplicative recovery or complex apportionment of damages. 459 U.S. at 537-45.

The proper plaintiffs to bring a price-fixing claim here would be direct purchasers of Full Text OCR software, not Abbyy USA. If the price of such software increased above competitive levels as a result of the alleged price fixing, direct purchasers would have been harmed when they paid the overcharge. In contrast, as a competing supplier, Abbyy USA would have benefited if its competitors agreed to raise prices. Because any harm that Abbyy USA suffered was indirect (or more likely non-existent), Abby USA does not have antitrust standing to bring its price-fixing claim under the six-factor *AGC* test. The lack of connection between the alleged price-fixing and any harm to Abbyy USA means Abbyy USA cannot satisfy the first and fourth factors. Under the third factor, the fact that Abbyy USA would benefit from the alleged price fixing necessarily means that the "harm" suffered by Abbyy USA is not of a type that Congress sought to redress with the antitrust laws. Finally, because direct purchasers and not Abbyy USA would pay the resulting overcharges, Abbyy USA cannot satisfy the fifth and sixth factors. Any damages to Abbyy USA would necessarily be speculative, and any recovery by Abbyy USA would risk duplicating the damages to which the direct purchasers would be entitled.

Third, even if the Court were to conclude that Abbyy USA has suffered antitrust injury and has standing to pursue its claim that Nuance sought to fix prices, the Court should dismiss the allegation as insufficiently pleaded to survive a motion to dismiss under *Twombly*. The Supreme Court explained in *Twombly* that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 127 S. Ct. at 1964-65 (second alteration in original) (citations omitted). The Court went on to conclude that a complaint

alleging a conspiracy among competitors needs to contain enough facts to plausibly suggest an agreement and not facts that are merely consistent with such an agreement. *Id.* at 1959.

As the Ninth Circuit recently recognized in *Kendall v. Visa USA, Inc.*, "to allege an agreement between antitrust co-conspirators, the complaint must allege facts such as a 'specific time, place, or person involved in the alleged conspiracies' to give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin." 518 F.3d 1042, 1047 (9th Cir. 2008) (*quoting Twombly*, 127 S. Ct. at 1970 n.10); *see also Rutman Wine*, 829 F.2d at 736 ("The pleader may not evade these requirements by merely alleging a bare legal conclusion; if the facts 'do not at least outline or adumbrate' a violation of the Sherman Act, the plaintiffs 'will get nowhere merely by dressing them up in the language of antitrust.'") (citations omitted).

Abbyy USA's conclusory and formulaic allegations regarding Nuance's alleged agreement(s) with its competitors cannot survive a motion to dismiss. Abbyy USA has not alleged any specific time, place, or person(s) involved in the alleged conspiracy. Abbyy USA has not even alleged, as was the case in *Twombly*, facts that could be considered parallel conduct by Nuance and its competitors, let alone any facts from which an agreement could be inferred.

In fact, Abbyy USA's claim does not even include an explicit allegation that there was an agreement or conspiracy among Nuance and its competitors. The claim only alleges that Nuance "sought" to reach agreement, not that Nuance ever reached an agreement with coconspirators. As such, there is no claim under Section 2 of the Sherman Act. *See Am. Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946) ("A correct interpretation of the statute and of the authorities makes it the crime of monopolizing, under § 2 of the Sherman Act, for *parties*, as in these cases, to combine or conspire to acquire or maintain the power to exclude competitors . . . .") (emphasis added).

This Court should not countenance Abbyy USA's attempt to drag this case into the maelstrom of antitrust discovery based on nothing more than formulaic allegations. *See Twombly*, 127 S. Ct. at 1966-67 ("[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust

discovery can be expensive.") (internal citation omitted). Abbyy USA's boilerplate assertion that Nuance "sought" to fix prices with competitors is plainly insufficient under *Twombly*.

3. Acquisition of Competitors

The third "predatory act" alleged in Abbyy USA's Sixth Claim is that Nuance "sought to acquire competitors to reduce supply and raise prices." Compl. ¶ 38(c). On its face, this allegation should be dismissed because it does not allege that Nuance actually acquired any of its competitors. Absent any such acquisitions, there is no antitrust injury. Even if the Court presumes this to be a drafting error and assumes Abbyy USA has alleged that Nuance **actually acquired** competitors to reduce supply and raise prices, this allegation is insufficient to state a claim. Abbyy USA has not identified **which** competitors Nuance acquired, **when** they were acquired, **whether** these competitors also sold Full Text OCR software, **what** market share these competitors had, or **whether** any of these acquisitions provided Nuance with market power. Absent these facts, the unremarkable allegation that Nuance has acquired competitors fails to state a claim.

Acquisitions are typically challenged under Section 7 of the Clayton Act, where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly," 15 U.S.C. § 18, although they can also be challenged under Section 2 of the Sherman Act, as Abbyy USA does in this claim. *See* 15 U.S.C. § 2. The U.S. Department of Justice and Federal Trade Commission jointly issued *Horizontal Merger Guidelines* explain the general considerations for whether a merger is anticompetitive. *See* U.S. Dep't of Just. & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (1992, § 4 on efficiencies (as revised 1997)) ("*Horizontal Merger Guidelines*"). Every merger case will focus on different aspects of the Guidelines, but the courts generally follow these guidelines. *See, e.g.*, *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004); *F.T.C. v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004). Abbyy USA has not identified **which** competitors Nuance acquired, **when** they were acquired, **whether** these competitors also sold Full Text OCR software, **what** market share these competitors had, or whether any of these acquisitions provided Nuance with market power.

Absent these facts, the unremarkable allegation that Nuance has acquired competitors fails to state a claim.

Moreover, Abbyy USA's only allegation concerning the effect of these acquisitions is that they have reduced supply and raised prices. Compl. ¶ 38(c). As explained above, *supra*, at page 5, the Supreme Court has made it clear that plaintiffs such as Abbyy USA do not suffer antitrust injury as a result of actions by their competitors that reduce supply or raise prices. *See, e.g.*, *Matsushita*, 475 U.S. at 582-83. As a competitor, Abbyy USA stands to benefit from alleged reduced supply and increased prices for Full OCR Text software. In order for Abbyy USA to have a viable claim, in addition to alleging specific facts regarding the transactions and market power, it must also allege that the acquisitions would allow Nuance to cause anticompetitive injury to Abbyy USA. *See, e.g.*, *Cargill*, 479 U.S. at 115-17 (rejecting competitor claim that merger would lead to increased price competition but acknowledging that predatory pricing as a result of the merger is a viable claim). Therefore, this claim not only fails to allege sufficient facts to state a claim, but even if it did, Abbyy USA would have no standing to pursue such a claim where the only alleged effect of the acquisitions has been to reduce supply and increase prices.

4. Litigation Threats

The fourth "predatory act" alleged in Abbyy USA's Sixth Claim is that Nuance "threatened competitors and customers of competitors." Compl. ¶ 38(d). This allegation is insufficient to state a claim because 1) it is not a violation of the antitrust laws to assert a valid legal claim; and 2) to the extent that this allegation suggests that Nuance sought to reach anticompetitive agreements with its competitors, the claim is insufficient under *Twombly* to state a claim.

In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, the Supreme Court explained the limited circumstances under which the use of litigation could violate the antitrust laws:

> the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham

> exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation.

508 U.S. 49, 60 (1993). Therefore, unless Nuance threatened competitors with "objectively baseless" litigation, Nuance is entitled to immunity. *See id.*; *see also E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Abbyy USA does not allege that Nuance threatened or in fact engaged in any "sham" litigation as described in *Professional Real Estate Investors*. Nuance's alleged threats of litigation do not state a claim because Nuance is entitled to sue or threaten to sue without violating the antitrust laws as long as the asserted claims are not objectively baseless. *See also PrimeTime 24 Joint Venture v. NBC*, 219 F.3d 92, 100 (2d Cir. 2000); *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1560 (11th Cir. 1992); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367-68 (5th Cir. 1983).

Abbyy USA also alleges that Nuance threatened increased litigation if competitors refused to engage in anticompetitive conduct. Like Abbyy USA's prior allegation that Nuance "sought to reach agreement on pricing with competitors," this allegation fails to state a claim under *Twombly* and *Kendall* because it does not provide anything but conclusory information about Nuance's attempts to reach agreements with competitors. Abbyy USA does not allege **which** competitors were threatened, **when** they were threatened, **whether** any competitors reached an agreement with Nuance, or **what** specific anticompetitive conduct these competitors refused to engage in. Consequently, this allegation should be dismissed as well.[3]

5. Patent Acquisitions

The final "predatory act" alleged in Abbyy USA's Sixth Claim is that Nuance "acquired patents covering OCR technology, with the purpose of substantially lessening competition in software markets." Compl. ¶ 38(e). Much like Abbyy USA's earlier allegation that Nuance acquired competitors in order to reduce supply and raise prices, this allegation is also insufficient to state a claim because it provides no basis to conclude that Nuance's alleged patent acquisitions

[3] To the extent such anticompetitive conduct resulted in increased prices, Abbyy USA does not have standing to pursue such claims under *Associated General Contractors* as direct purchasers of Full Text OCR software are the proper plaintiffs. *See* pages 6-7, *supra*.

have substantially lessened competition under Section 7 of the Clayton Act or have resulted in monopolization under Section 2 of the Sherman Act.

Acquisitions of intellectual property are analyzed under the same standards explained above in the *Horizontal Merger Guidelines*. *See* U.S. Dep't of Just. & Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* § 5.7 (1995) ("Certain transfers of intellectual property rights are most appropriately analyzed by applying the principles and standards used to analyze mergers, particularly those in the 1992 Horizontal Merger Guidelines."). Abbyy USA's bare allegation that Nuance has acquired patents covering OCR technology for the purpose of substantially lessening competition is, again, a conclusory allegation that should be dismissed under *Twombly*. First, Abbyy USA does not allege **what** patents were acquired, **when** they were acquired, **who** they were acquired from, or **what** specifically they encompass. Secondly, Abbyy USA does not allege any facts to establish that Nuance actually owned patents which when combined with the patents it later **acquired** prevented competitors from entering the Full Text OCR market or resulted in an increase in market power in violation of Section 2 of the Sherman Act. Putting it more simply, Abbyy USA does not allege that any of these patent acquisitions resulted in Nuance obtaining market power in Full Text OCR technology.

B. Seventh Claim

In its Seventh Claim, Abbyy USA alleges that the conduct alleged in its Sixth Claim amounted to attempted monopolization under Section 2 of the Sherman Act, which also makes unlawful attempted monopolization. *See* 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize . . ."). This claim for attempted monopolization fails to state a claim for the same reasons that the allegations of "predatory acts" asserted in the Sixth Claim failed to state a claim. Whether the conduct alleged is considered to be a violation of Section 2 as monopolization or attempted monopolization, the claims are still insufficiently pleaded under *Twombly* to state a claim.

Abbyy USA not only reasserts the same conduct as it alleged in its Sixth Claim, but also contradicts its earlier assertion that "[a]t times material hereto, Nuance has had in excess of 70%

of the product market of Full Text OCR software in the geographic market of the United States." Compl. ¶ 40. Instead, Abbyy USA alleges that the United States is not the relevant market and that there are "certain geographic submarkets within the United States" in which Nuance "had less than enough market power to actually monopolize these markets." Compl. ¶ 45. It is within these so-called "sub-markets" that Nuance has allegedly attempted to monopolize in violation of Section 2 of the Sherman Act "by engaging in the aforementioned conduct and predatory acts." Compl. ¶ 45.

By alleging the existence of sub-markets in which Nuance did not have market power, Abbyy USA has provided this Court with another convincing reason to dismiss the Seventh Claim. Abbyy USA must allege facts that support that Nuance had a dangerous probability of achieving market power in the "sub-markets" in which, by Abbyy USA's own admission, it did not have market power. *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 893 (9th Cir. 2008). Abbyy USA alleges no such facts. Abbyy USA does not allege **what** market share Nuance had in these "sub-markets," and also does not allege **how** Nuance acted in these sub-markets such that there was a dangerous probability that Nuance would achieve market power. Finally, Abbyy USA does not even allege the contours of these sub-markets. Abbyy USA only alleged that there are "sub-markets" within the United States without further describing the boundaries of these sub-markets.

C. Eighth Claim

Abbyy USA's Eighth Claim for exclusive dealing is identical to its allegation of exclusive dealing in its Sixth Claim and should be dismissed for the same reasons. The only difference is that here Abbyy USA has made the allegation under Section 1 of the Sherman Act instead of Section 2 of the Sherman Act. The primary deficiencies in the alleged conduct remain the same. Abbyy USA once again alleges that the exclusive contracts at issue render "Nuance as the only seller of OCR software in *certain* retail outlets." Compl. ¶ 52 (emphasis added). Abbyy USA makes no allegations that the number of retail outlets that have exclusive contracts with Nuance represent a substantial number of the total retail outlets. As previously explained, Abbyy USA also does not allege that retail outlets are a necessary means of distributing Full Text OCR

software. Because Abbyy USA has completely failed to make any allegations that establish a claim of exclusive dealing under Section 2 of the Sherman Act, the claim should also be dismissed under Section 1. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 70 (D.C. Cir. 2001) (Section 1 exclusive dealing requirements stricter than under Section 2); *Omega Envtl.*, 127 F.3d at 1167 n.13 (no Section 1 or 2 violation where broader requirements of Clayton Act Section 3 not met).

D. Ninth Claim

The Ninth Claim alleges the same conduct alleged in the Sixth Claim—that Nuance acquired competitors and patents—but alleges that the acquisitions violate Section 7 of the Clayton Act instead of Section 2 of the Sherman Act. Abbyy USA does not include any allegations that establish that Nuance engaged in acquisitions whose effect would be "substantially to lessen competition, or to tend to create a monopoly" under Section 7 of the Clayton Act. 15 U.S.C. § 18.

In this claim, Abbyy USA also alleges that Nuance has acquired Caere Corporation, which has "had the effect of substantially lessening competition in certain relevant markets, including the market for Full Text OCR software products." Compl. ¶ 55. In addition, Abbyy USA alleges that this acquisition has "included the acquisition of patented OCR technology . . . which has had the effect of eliminating capacity for the production of software with a resultant stabilizing of prices all to the detriment of the consuming public." Compl. ¶ 56. As in its Sixth Claim, Abbyy USA's allegations here are deficient.

First, like its claims for conspiracy, Abbyy USA does not have standing to bring this claim, because as a competitor, Abbyy USA stood to benefit from any alleged anticompetitive effect of the Caere acquisition. *See Matsushita*, 475 U.S. at 582-83 ("Nor can respondents recover damages for any conspiracy by petitioners to charge higher than competitive prices in the American market. Such conduct . . . could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price . . . ."). Indeed, Abbyy USA alleges that the effect of the transaction was to "stabiliz[e] prices all to the detriment of the consuming public." *See* Compl. ¶56. While the "consuming public" may have standing to bring

this claim, Abbyy USA does not, because as its complaint makes clear, the alleged harm is the stabilization of (or increase in) prices, which is not harm to a competitor cognizable under the antitrust laws.

Second, Abbyy USA's Section 7 claim is time barred. The statute of limitations under Section 7 of the Clayton Act is four years. *See Conmar Corp.*, 858 F.2d at 501 ("Antitrust actions under the Clayton Act are subject to a four-year statute of limitations. 15 U.S.C. § 15b (1982)."). The Caere acquisition, which the Complaint alleges occurred in 2000 (*see* Compl. ¶56), is well-beyond the four-year statute of limitations.

Third, Abbyy USA does not allege any continuing violation of Section 7 that would result in the tolling of the statute of limitations, a tolling that would be required in order for even this insufficiently pleaded claim to not be time barred. *See Midwestern Mach. Co. v. Northwest Airlines, Inc.*, 392 F.3d 265 (8th Cir. 2004); *see also* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law § 320c5 (3d ed. 2007 & 2006 Supp.) (In order to toll statute of limitations, a plaintiff must allege that "the acquired assets were used in an anticompetitive way not contemplated at the time of the acquisition and caused the plaintiff injury. Once again, this subsequent and new use must be causally linked to the merger.").

III. CONCLUSION

For the foregoing reasons, Nuance respectfully requests that this Court dismiss Abbyy USA's Sixth through Ninth Claims.

Dated: July 11, 2008

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